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OFFICE OF THE SECRETARY

December 13, 1999

VIA HAND DELIVERY

Magalie Roman Salas, Secretary
Federal Communications Commission
445 12th Street, S.W.
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Washington, D.C. 20554

EX PARTE OR LATE FILED

Re: *Ex Parte* Presentation

**Petition for Reconsideration in CC Dkt. No. 96-45 filed by the
Washington State Department of Information Services regarding
participation by schools and libraries eligible for universal service
support in buying consortia that include private colleges**

Dear Ms. Salas:

Pursuant to 47 C.F.R. § 1.1206, we are enclosing an original and one copy of a written *ex parte* presentation to Irene Flannery and Praveen Goyal regarding the above-captioned matter. Please date-stamp the copy provided and return it to the messenger for return delivery to us.

Should there be any questions regarding this matter, please do not hesitate to contact the undersigned at 202-414-9276.

Very truly yours,

Judith L. Harris
Judith L. Harris

JLH/lam
Enclosure

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VIA HAND DELIVERY

Irene Flannery, Esq.
Praveen Goyal, Esq.
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

**RE: Petition for Reconsideration in CC Dkt. No. 96-45 filed by the
Washington State Department of Information Services (regarding
participation by schools and libraries eligible for universal service
support in buying consortia that include private colleges)**

Dear Ms. Flannery and Mr. Goyal:

As you know, we recently met to discuss a July 16, 1997 Petition for Reconsideration filed by the State of Washington Department of Information Services ("DIS") in the Commission's Universal Service proceeding, CC Docket No. 96-45.¹ In its *Petition*, DIS asked the Commission to reconsider one minor aspect of its Universal Service Fund ("USF") rules regarding the participation in buying consortia of entities eligible for USF support. We are writing to follow up on certain questions that arose during our meeting.

¹ Washington State Department of Information Services, *Petition for Reconsideration*, CC Dkt. No. 96-45, filed on July 16, 1997 (hereinafter "*Petition*")

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The Commission's rules currently provide that entities eligible for USF support may form and participate in consortia in order to increase their buying power.² Such consortia may consist of other entities eligible for USF support (public and private elementary and secondary schools, libraries and health care providers), and may also include ineligible public sector (governmental) entities, such as large state universities. The Commission's rules specifically include among the public sector entities with which eligible schools and libraries may join "the large state networks upon which many schools and libraries rely for their telecommunications needs."³

Eligible schools and libraries may also form buying consortia with private sector entities that are ineligible for USF support.⁴ However, under the Commission's current rules, when ineligible private sector entities are part of such consortia, the eligible schools and libraries that participate in the consortia are not able to use their USF discounts unless any interstate telecommunications services purchased by the consortia from incumbent local exchange carriers ("ILECs") are obtained at the ILECs' generally tariffed rates.⁵

² 47 C.F.R. § 54.501(d).

³ Federal-State Joint Board on Universal Service, *Report and Order*, 12 FCC Rcd. 8776, ¶¶ 33, 478 (rel. May 8, 1997) (hereinafter *Report and Order*).

⁴ *Id.* at ¶¶ 477-478.

⁵ 47 C.F.R. § 55.501(d). Rule 55.501(d) states, in relevant part:

(d) Consortia.

(1) For purposes of seeking competitive bids for telecommunications services, schools and libraries eligible for support under this subpart may form consortia with other eligible schools and libraries, with health care

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As we discussed during our meeting, and as DIS pointed out in its *Petition*, this private sector exception to the generally-inclusive rule that permits eligible schools and libraries to participate in consortia with both eligible and ineligible entities has had serious -- and undoubtedly unanticipated -- consequences in states such as Washington, where large public networks have been formed to serve a broad range of educational needs, including the needs of private, not-for-profit baccalaureate institutions. In those states, under the present rules, private baccalaureate institutions must either be excluded from participation in the states' educational networks, or entities connected to those networks that are eligible for USF support must forego the very advantages that the universal service rules regarding consortia were intended to create (*i.e.*, aggregation of buying power to obtain the lowest possible "pre-discount" rates for services).

It appears that this quandary has arisen as a result of the Commission's effort to resolve a conflict between, on the one hand, a recommendation by the Federal-State Joint Board on Universal Service ("Joint Board") that eligible entities should purchase telecommunications services at market-driven prices and should be required to seek competitive bids before getting

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providers eligible under Subpart G, and with public sector (governmental) entities, including, but not limited to, state colleges and state universities, state educational broadcasters, counties, and municipalities, when ordering telecommunications and other supported services under this subpart. With one exception, eligible schools and libraries participating in consortia with ineligible private sector members shall not be eligible for discounts for interstate services under this subpart. A consortium may include ineligible private sector entities if the pre-discount prices of any services that such consortium receives from ILECs are generally tariffed rates.

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USF support and, on the other hand, longstanding federal and state policies and rules prohibiting discriminatory pricing by carriers. We believe, however, that this conflict can be resolved, and otherwise eligible schools and libraries can be permitted to participate in buying consortia that include private, nonprofit baccalaureate institutions, without impairing the Commission's (or state) policies or violating applicable law.

I. Background

On November 7, 1996, the Commission released for comment the Recommended Decision of the Federal State Joint Board on Universal Service.⁶ In its Decision, the Joint Board suggested that the Commission permit schools and libraries eligible for universal service support to form buying consortia both with other eligible entities *and with ineligible entities*, including large private sector firms and commercial banks.⁷ The Board also recommended that the Commission require eligible schools and libraries to seek competitive bids for all services eligible for support.⁸

Subsequent to the Commission's release of the Joint Board's *Recommended Decision*, a few ILECs (notably, GTE and SBC) filed comments contending that current tariff rules (promulgated to give effect to statutory prohibitions on discriminatory pricing by carriers)

⁶ Federal State Joint Board on Universal Service, *Recommended Decision*, 12 FCC Rcd 87 (1996) (rel. Nov. 8, 1996) (hereinafter *Recommended Decision*).

⁷ *Id.* at ¶ 537.

⁸ *Id.* at ¶ 539.

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prevented ILECs from responding with prices other than their generally tariffed rates to requests for competitive bids from schools and libraries eligible for USF support. According to these ILECs, in a competitive bidding situation, a competitor that was not bound by the same tariff rules as the ILECs (*e.g.*, a non-dominant CLEC) could, in advance of placing its own bid, ascertain a particular ILEC's bid by reference to that ILEC's publicly-available tariff and could then underbid the ILEC.⁹ This, the ILECs argued, would effectively bar them from participation in the schools and libraries program (and would deprive eligible entities of the lowest possible market-driven prices). The ILECs, therefore, asked the Commission for relief from the tariff rules to enable them to respond to Requests for Proposals ("RFPs") from eligible schools and libraries at prices below their generally tariffed rates.¹⁰

However, as noted above, the Joint Board had recommended that eligible schools and libraries should be able to form consortia with ineligible public *and* private sector entities including, for example, large firms and commercial banks. This recommendation, coupled with

⁹ *Report and Order at Appendix J: Summary of Comments*, ¶ 301. *See also* Comsat Corporation, Petition Pursuant to Section 10(c) of the Communications Act of 1934, as amended, for Forbearance from Dominant Carrier Regulation and for Reclassification as a Non-Dominant Carrier, *Order and Notice of Proposed Rulemaking*, CC Dkt. No. 80-634, FCC 98-78, ¶ 66 (rel. Apr. 28, 1998) (noting that "[l]ong tariff notice periods enable non-dominant competitors, who are required to file tariffs on one-day's notice or not at all, to undercut a dominant carrier's filed rate" in competitive bidding situations).

¹⁰ Indeed, dominant carriers had attempted to obtain "tariff relief" in order to be able to respond to competitive bid requests with other than tariffed rates in other situations, even before the Commission's call for comments in the Universal Service proceeding, and the Commission had rejected those attempts. *Report and Order at Appendix J: Summary of Comments*, ¶ 301. *See also* *Southwestern Bell Telephone Company v. FCC*, 100 F.3d 1004 (D.C. Cir. 1996) (hereinafter *Southwestern Bell*).

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a requirement that eligible schools and libraries seek competitive bids, created a dilemma for the Commission: if it were to allow ILECs to offer services at other than tariffed rates to all consortia that included eligible schools and libraries, and if those consortia were also to include ineligible private sector entities as the Joint Board was recommending, several large, private firms could then join with a token school for the sole purpose of seeking a competitive bid from an ILEC at below generally tariffed rates.

This result would not only create a price discrimination between what the firms inside such a consortium would be charged and what similar firms that did not utilize this loophole had to pay for the same service(s), but it would also have the practical effect of seriously eroding the tariff regulations imposed on dominant carriers before sufficient competition had developed in local markets to merit such a change.¹¹

On the other hand, without reaching some accommodation by which ILECs could respond to RFPs from eligible schools and libraries with other than tariffed rates, those eligible entities, for all practical purposes, would not be able to secure services from ILECs and ILECs effectively would be barred from participation in the schools and libraries program.

¹¹ As the Commission stated:

We are concerned, however, that permitting *large private sector firms* to join with eligible schools and libraries to seek prices below tariffed rates could compromise both the federal and state policies of non-discriminatory pricing. *Report and Order* at ¶ 477.

See also, Southwestern Bell, supra note 9 at 1008, noting that, "we get the distinct impression that the Commission, as a matter of regulatory policy, does not wish to permit the [ILECs] to respond competitively to [CLECs] before the latter have achieved a stronger market position. But the difficulty with the Commission's order is that it does not say that . . ."

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Faced with this quandary, the Commission invoked its authority under section 201(b) of the Communications Act¹² to fashion a compromise that would allow ILECs to participate in competitive bidding in a specified, limited context and at the same time would preserve policies regarding non-discriminatory pricing and the integrity of the tariff rules until such time as the ILECs were no longer the dominant carriers in their respective markets. As the Commission explained:

Thus, although we find Congressional support for permitting eligible schools and libraries to secure prices at below tariffed rates, we find no basis for extending that exception to enable *all* private sector firms to secure such prices. [¶ 478] For this reason, as described in more detail below, we adopt a slightly modified version of the Joint Board's recommendation.¹³

The Commission then set out the rule as it currently appears at 47 C.F.R. § 54.501(d). In describing its rationale for drawing the line where it did, the Commission concluded:

[W]e find that ILECs will be free under sections 201(b) and 254 to participate in certain competitive bidding opportunities with rates other than those in their generally tariffed offerings. More specifically, they will be free, under section 201(b) of the Act, to offer different rates to consortia that consist solely of governmental entities, eligible health care providers, and schools and libraries eligible for preferential rates under section 254. Thus, *we hereby designate communications to organizations, such as schools and libraries and eligible health care providers, eligible for preferential rates under section 254 as a class of communications*

¹² 47 USC §201(b). The relevant portion of this provision is set forth in **Part II. Discussion**, *infra*.

¹³ *Report and Order* at ¶¶ 477-478 (emphasis added).

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*eligible for different rates, notwithstanding the nondiscrimination requirements of section 202(a).*¹⁴

We believe, as discussed below, that the same authority that the Commission relied on in fashioning a solution that balanced the concerns raised by the ILECs with its own commitment to preserving, for the time being, the tariff regulations imposed on dominant carriers, also clearly empowers the Commission to grant the modest relief being sought by the State of Washington.

II. Discussion

The federal policies of non-discriminatory pricing that the Commission wished to preserve are codified in sections 201-205 of the Communications Act of 1934, as amended (the "Act"), 47 U.S.C. §§201-205.¹⁵ Specifically, section 202(a) of the Act states:

¹⁴ *Report and Order* at ¶ 483 (emphasis added). The Commission also noted that "Congress has expressly granted an exemption to Section 202(a)'s prohibition against discrimination for *these classes* of communications." *Id.* The phrase "these classes," was apparently intended to refer to the class of eligibles specifically referenced in Section 254(h)(1)(B) of the Act and the class of "governmental entities" specifically referenced in Section 201(b).

¹⁵ In addition to the relevant provisions of the Communications Act, the Commission's tariff rules, which are found in Part 61 of the Commission's rules, 47 CFR Part 61 -- Tariffs, and which were promulgated pursuant to the authority of, *inter alia*, §§201-205 of the Act, have further shaped the "policies of non-discriminatory pricing" to which the Commission referred in its *Report and Order* and to which the ILECs referred in their Comments. Collectively, those rules create varying degrees of constraints and reporting requirements for carriers, depending upon whether such carriers are classified as "dominant" or "non-dominant."

Dominant carriers (e.g., ILECs) are subject to greater regulatory restraint than non-dominant carriers because dominant carriers, by definition, are carriers that have been found to possess market power; market power refers to a dominant carrier's ability to raise or maintain prices above costs, control prices, or exclude competition -- in short, to engage in price discrimination - - and regulatory constraints are, therefore, imposed in order to counteract dominant carriers' market power. The tariff rules applicable to dominant ILECs are designed to prevent them from

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It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.¹⁶

Section 201 also prohibits unjust and unreasonable charges. However, subsection (b) of section 201 sets forth certain classes of communications for which different charges *can* be made (without running afoul of the statutory prohibition on price discrimination) and then specifically gives the Commission the unlimited power to create "such other classes as the Commission may decide to be just and reasonable." That subsection states, in relevant part:

All charges, practices, classifications, and regulations for and in connection with [interstate or foreign communication by wire or radio], shall be just and reasonable and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful: *Provided*, that communications by wire or radio subject to this Act may be classified into day, night, repeated, unrepeated, letter, commercial, press, government, *and such other classes as the Commission may decide to be just and*

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raising prices to unjust or unreasonable levels or engaging in predatory pricing by offering their services below cost. By requiring dominant ILECs to cost-justify their rates and to make those rates publicly available, the policies of non-discriminatory pricing are ensured.

¹⁶ 47 U.S.C. § 202(a). The ILECs' concern about potential violations of this provision was understandable. Sections 202(c) and 203(e) of the Communications Act of 1934, as amended, 47 U.S.C. §§202(c), 203(e), provide for substantial forfeitures to the United States for every knowing violation of section 202(a) and include additional monetary penalties for each and every day of any such offense continues.

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*reasonable, and different charges may be made for the different classes of communications.*¹⁷

It is this statutory power that the Commission invoked in creating a class of communications eligible for preferential rates consisting of "communications to organizations, such as schools and libraries and eligible healthcare providers," *see* discussion at p. 8, *supra*. However, there is absolutely nothing in this provision that compels the Commission to limit participation in consortia that are able to buy at below tariffed prices to governmental and section 254(h)(1)(B) entities only.

Rather, the language of section 201(b) plainly empowers the Commission to create classifications *other* than those specifically listed (*i.e.*, other than "day, night, repeated, unrepeatd, letter, commercial, press, *government . . .*" (emphasis added)) and other than classifications created by other sections of the Communications Act (*e.g.*, section 254), by giving it the unrestricted residual power to create "such other classes as the Commission may decide to be just and reasonable," regardless of their type or number.¹⁸

¹⁷ 47 U.S.C. § 201(b) (emphasis added).

¹⁸ This power has been recognized for decades by the courts, as well as by the Commission. Consider the following passage from a 1942 federal district court case:

Section 201(b) empowered the Commission to establish a classification other than the 'day, night, repeated, unrepeatd, letter, commercial, press, Government' services specifically mentioned in the section, which it 'may decide to be just and reasonable' . . . The classification and charges which under Section 201(b) it alone [the Commission] was empowered to establish were such as it might 'decide to be just and reasonable'; in other words under the wording of the section, the classification and ratio were not to be determined by what was in an objective sense 'just and reasonable,' but by what the Commission should decide to be such. *RCA Corp. v. U.S.*, 43 F.Supp. 851, 856 (S.D.N.Y. 1942). *See also* Sports

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It is precisely this residual power that we respectfully urge the Commission to invoke to add baccalaureate institutions of higher learning, including independent, nonprofit colleges and universities, to the class (or classes) of those entities (now limited to governmental and section 254 eligible entities) that can participate in buying consortia that purchase long distance services from ILECs at competitively bid prices. This small use of the Commission's undisputed power would wholly eliminate the unsatisfactory result that the current rule creates. Indeed, we believe that not to invoke this power under the circumstances presented here would be to leave in place a rule which creates an unjust and unreasonably discriminatory classification.

III. Support for the Requested Relief

As DIS's 1997 *Petition* explained, the Washington State Legislature both established, and authorized funding for, a "K-20 Educational Telecommunications Network" during the state legislative session in 1996. The Legislature's intent was to provide opportunities for distance learning, and for administration and resource sharing among each of the State's 296 public K-12 school districts, its technical and community colleges, its public baccalaureate institutions and its state and local libraries, as well as its private K-12 and baccalaureate institutions.¹⁹ In establishing the network, the Washington Legislature found, *inter alia*, that "in order to facilitate lifelong learning, educational technology systems must be

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Network, Inc. v. American Telephone and Telegraph, *Initial Decision of Hearing Examiner Herbert Sharfman*, 25 FCC 2d 560, at ¶ 63 (Jan. 30, 1968) (quoting *RCA Corp. v. U.S.*).

¹⁹ *Petition* at 3.

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coordinated among all educational sectors with other entities of federal, state, and local government, and be readily accessible to the general population of the state."²⁰

The Commission's current eligibility criteria for consortia undermine the goals of the Washington Legislature and put it between the proverbial "rock and a hard place." On the one hand, barring the participation of independent, nonprofit baccalaureate institutions in the State's educational network means isolating numerous small private colleges with modest (at best) endowments, some of which are located in geographically isolated areas where public higher educational opportunities are limited,²¹ and abandoning the State's goal of facilitating the broadest possible exchange of educational programs and resources among private and public institutions at all levels.

On the other hand, foregoing USF support for schools and libraries connected to the network that would be eligible for such support but for the presence on the network of private, nonprofit baccalaureate institutions, or buying all of the network's interstate services

²⁰ *Petition* at 4 (quoting E 2SSB 6705, Sec. 1 (1996), codified at Rev. Code Wash. Sec. 28D.02 (1996)).

²¹ Heritage College, for example, sits within the Yakima Indian Reservation. Its director was recently recognized with a MacArthur Foundation fellowship for her work providing educational opportunities to Native Americans and Hispanics in central Washington. Washington State's other outstanding nonprofit independent baccalaureate institutions include Antioch University, Cornish College of the Arts, Gonzaga University, Northwest College, Pacific Lutheran University, St. Martin's College, Seattle University, Seattle Pacific University, University of Puget Sound, Walla Walla College, Whitman College, and Whitworth College. These institutions collectively produce more than a quarter of the state's school teachers. None of them is a "public sector (governmental) entity under the Commission's rules," but their value to the state's educational system cannot be overstated.

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from ILECs at generally tariffed rates would either deprive eligible schools and libraries of revenues badly needed to meet their communications needs and educational goals or dramatically increase the costs to the network (and to eligible entities on the network) of obtaining telecommunications services, thereby significantly impairing the ability of the State to fulfill the mandate of the Legislature and to realize the full benefits of its educational network.

As Senator Slade Gorton summed it up in a November, 1997 letter to the Commission supporting DIS's *Petition*, "these rules put Washington state in a terrible predicament. The state has already invested over \$50 million to design and begin construction of . . . the "K-20 Educational Telecommunications Network" . . . [T]he FCC's current rules force Washington state to choose between sacrificing subsidies it cannot afford to lose, and denying services to private colleges that are a critical part of the state's educational and economic development equation."²²

Interestingly, Chairman Kennard in responding to Senator Gorton, first reviewed the current rules and noted that "[t]he Commission determined that this result was consistent with the nondiscrimination requirements found in section 202 of the Communications Act" and then went on to conclude: "[a]lthough the specifics of Washington's 'K-20 Educational Telecommunications Network' are not included in your letter, it should not be in jeopardy because of the inclusion of the private colleges to the network."

²² Hon. Slade Gorton, United States Senator, Letter in Support of Petition for Reconsideration Filed by Washington Department of Information Services in CC Docket No. 96-45, November 24, 1997 (copy attached).

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Senator Gorton's concerns were re-echoed about a year and a half later, in May, 1999, when a bi-partisan delegation of seven Congressional leaders sent another letter to the Commission urging "prompt and favorable consideration" of DIS's *Petition*.²³ The delegation noted that the federal government generally treats all qualified nonprofit institutions of higher education the same for purposes of evaluating their eligibility for government programs, without distinguishing between public nonprofits and private nonprofits. The delegation urged the Commission to replace the arbitrary distinction between public and private institutions of higher education contained in its rules with a distinction between private for-profit institutions and private nonprofit institutions, consistent with federal practice in all other areas.²⁴

In support of its letter urging prompt Commission action, the delegation forwarded a Joint Memorial passed by both houses of the Washington State Legislature and approved by the Governor, summarizing the state's efforts to develop its K-20 network, the importance of nonprofit independent baccalaureate institutions to the network, and the effect of the Commission's (then) eighteen-month delay in responding to DIS's *Petition*.²⁵ The Legislature called for copies of the Memorial to be forwarded to, *inter alia*, President Clinton, members of the U.S. Senate Commerce Committee, the U.S. House Subcommittee on

²³ Hon. Slade Gorton, Hon. Adam Smith, Hon. Jennifer Dunn, Hon. Jack Metcalf, Hon. Norman Dicks, Hon. George Nethercutt, Jr., Hon. Brian Baird, Letter, May 3, 1999 (copy attached). It appears that there was never a written response to this letter.

²⁴ *Id.* See also 20 U.S.C. §§ 1001(a)(4) and (b)(2) (defining "institution of higher education" as a "public or other nonprofit institution" for federal purposes).

²⁵ State of Washington, House Joint Memorial 4011, 56th Legislature, 1999 Regular Session (copy attached).

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Telecommunications, each member of Congress from the State of Washington, and the members of the Federal Communications Commission.²⁶ This mandate has been fulfilled.

Moreover, in addition to the several *ex parte* meetings you (and others at the Commission) have been generous enough to have with individuals representing DIS and the State of Washington, representatives from both the Washington Association of Independent Colleges and Universities and the National Association of Independent Colleges and Universities have met with Commission staff and submitted letters in support of DIS's *Petition* in the hope that the Commission will soon act favorably so that the schools and colleges they represent may be able to join the State's cutting edge educational network without jeopardizing USF support for eligible K-12 schools and libraries already "hooked up" to that network.

IV. Conclusion

In the two and a half years that DIS's *Petition* has been pending at the Commission, Washington's K-20 project has developed from a legislative directive to an actual network connecting virtually every public educational institutions in the state, with about 1000 circuits installed at more than 400 sites. Washington now stands poised to connect to the network the last of its educational entities -- the State's independent nonprofit higher educational institutions.

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To this end, the Washington Association of Independent Colleges and Universities has been meeting since early summer with representatives of DIS to discuss site requirements for possible future connection of their members. The only thing standing in the way of those connections at this point is the Commission's rules regarding the participation in buying consortia of entities eligible for USF support.

We have included (as Exhibit A) a proposed minor change to rule 54.501(d) that reflects a solution to the problem DIS has identified in its *Petition* and we respectfully ask the Commission to consider adopting our suggested language in granting DIS's *Petition*. We believe that the minor change we propose will enable DIS to connect independent nonprofit baccalaureate institutions to its K-20 network without any impact at all upon the Commission's current policies with regard to nondiscriminatory pricing.

Alternatively, we respectfully ask that the Commission treat DIS's Petition for Reconsideration as a Petition for Waiver under section 1.3 of the Commission's rules, 47 CFR § 1.3, and grant DIS a limited waiver from the specific application of the Commission's rule regarding buying consortia, only insofar as that rule currently bars, for all practical purposes, participation by private, nonprofit colleges in the State's K-20 network. We note that the Commission may grant a waiver of any of its rules, in whole or in part, on its own motion or by

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petition, for good cause shown.²⁷ Moreover, since the grant of a waiver does not eliminate or change the rules, such waiver can be granted without a rulemaking proceeding.²⁸

Without some "fix," such as one of those we suggest, the State of Washington -- and the small private colleges that are so integral to the State's educational plan and so important to the State's future -- are marooned. We would be happy to assist you further in any

²⁷ 47 CFR §1.3 states:

Suspension, amendment, or waiver of rules. - The provisions of this chapter may be suspended, revoked, amended or waived for good cause shown, in whole or in part, at any time by the Commission, subject to the provisions of the Administrative Procedure Act and the provisions of this chapter. Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.

²⁸ COMSAT Corporation Petition for Partial Relief From the Current Regulatory Treatment of Comsat World Systems' Switched Voice, Private Line, and Video and Audio Services, *Order*, 11 FCC Rcd 9622, at ¶¶ 9-10 (rel. Aug. 15, 1996) (hereinafter *Comsat*).

In *Comsat*, the Commission stated in ¶ 9: "Although Comsat styled its request as a petition for partial relief, and filed it as part of a rulemaking proceeding, we find that its request is more in the nature of a request for waiver of our tariffing rules, and will treat it as such."

In the next paragraph, the Commission explained: "The Commission may waive rules if good cause is shown. In determining whether to waive a particular rule, the United States Court of Appeals for the District of Columbia has stated that the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. Waiver is thus appropriate if special circumstances warrant a deviation from the general rule and such deviation would better serve the public interest than would strict adherence to the general rule. . . . Contrary to some commenters' claims, we do not need to conduct a rulemaking to waive a portion of our rules. . . . [W]e are waiving a portion of these rules, not eliminating them. . . . Thus, a waiver of these rules . . . does not require a rulemaking proceeding." (Internal citations omitted.)

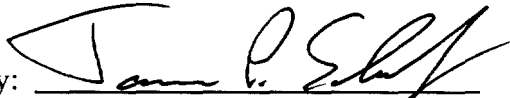
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fashion so that DIS's *Petition*, which has now been pending since July, 1997, can finally be resolved.

Respectfully submitted,

**STATE OF WASHINGTON
DEPARTMENT OF INFORMATION
SERVICES**

By: 

Judith L. Harris
James P. Schulz
REED SMITH SHAW & McCLAY LLP
1301 K Street, N.W.
Suite 1100 - East Tower
Washington, D.C. 20005
(202) 414-9200

Its attorneys

EXHIBIT A

Proposed Rule

Section 54.501(d)(1) of the Commission's Rules, 47 CFR § 54.501(d)(1), currently reads as follows:

(d) Consortia.

(1) For purposes of seeking competitive bids for telecommunications services, schools and libraries eligible for support under this subpart may form consortia with other eligible schools and libraries, with health care providers eligible under Subpart G, and with public sector (governmental) entities, including, but not limited to, state colleges and state universities, state educational broadcasters, counties, and municipalities, when ordering telecommunications and other supported services under this subpart. With one exception, eligible schools and libraries participating in consortia with ineligible private sector members shall not be eligible for discounts for interstate services under this subpart. A consortium may include ineligible private sector entities if the pre-discount prices of any services that such consortium receives from ILECs are generally tariffed rates.

Our proposed changes would modify the rule by adding the words in bold-faced type and by striking the resulting redundant reference to state colleges and state universities:

(d) Consortia.

(1) For purposes of seeking competitive bids for telecommunications services, schools and libraries eligible for support under this subpart may form consortia with other eligible schools and libraries, **with baccalaureate institutions of higher education, including state colleges, state universities, and independent, non-profit colleges and universities**, with health care providers eligible under Subpart G, and with public sector (governmental) entities, including, but not limited to, ~~state colleges and state universities~~, state educational broadcasters, counties, and municipalities, when ordering telecommunications and other supported services under this subpart. With one exception, eligible schools and libraries participating in consortia with ineligible private sector members shall not be eligible for discounts for interstate services under this subpart. A consortium may include ineligible private sector entities if the pre-discount prices of any services that such consortium receives from ILECs are generally tariffed rates.¹

¹ Note: Many of the transport services for the State of Washington's K-20 Educational Telecommunications Network are provided by ILECS (incumbent local exchange carriers). The Telecommunications Act of 1996 ("Act") defines "incumbent local exchange carrier" (ILEC) as meaning:

with respect to an area, the local exchange carrier that --

Continued on following page

Alternatively, as explained in the text, the Commission could treat DIS's Petition for Reconsideration as a Petition for Waiver under section 1.3 of the Commission's rules, 47 CFR § 1.3, and grant DIS's Petition insofar as it seeks a waiver from the specific application of the current rule to its K-20 network, in order to permit DIS to connect independent non-profit baccalaureate institutions to the network. Under this alternative solution, we propose the following Ordering Clauses:

ORDERED THAT:

To the extent that the Commission has treated DIS's Petition for Reconsideration as a Petition for Waiver from the application of Section 54.501(d)'s private entity exception for the specific purpose of connecting independent non-profit baccalaureate institutions to its K-20 educational network without adversely affecting the universal service support that would otherwise be available to other entities connected to the network, the petition is GRANTED;

In all other respects, the petition is DENIED.

Continued from previous page

(A) on the date of enactment of the [Act], provided telephone exchange service in such area; and

(B)(i) on such date of enactment, was deemed to be a member of the exchange carrier association pursuant to [47 C.F.R. 69.601(b)]; or

(ii) is a person or entity that, on or after such date of enactment, became a successor or assign to a member described in clause (i).

EXHIBIT B

Correspondence

SLADE GORTON
WASHINGTON

730 HART SENATE OFFICE BUILDING
(202) 224-3441

United States Senate

WASHINGTON, DC 20510-4701

COMMITTEES:
APPROPRIATIONS
BUDGET
COMMERCE, SCIENCE
AND TRANSPORTATION
ENERGY AND NATURAL
RESOURCES
INDIAN AFFAIRS

November 24, 1997

The Honorable Michael Powell
Federal Communications Commission
1919 M St., N.W.
Suite 844
Washington, D.C. 20554

Re: Support of Petition for Reconsideration Filed by Washington Department of Information Services in CC Docket No. 96-45

Dear Commissioner Powell:

I am writing to direct your attention to a matter currently pending before the FCC that is of great importance to public and private schools and colleges in Washington state.

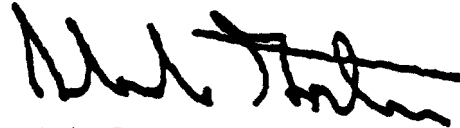
In the Telecommunications Act of 1996, Congress provided for subsidies to develop telecommunications and computing infrastructure for schools and libraries. As the implementing rules are currently written, however, it appears that the FCC could deny discounts to schools and libraries that acquire services through consortia, if those consortia buy services at less than a tariffed rate and the consortia include private colleges and other private entities.

These rules put Washington state in a terrible predicament. The state has already invested over \$50 million to design and begin construction of a state-wide network that will link all Washington public universities, community and technical colleges, educational service districts, school districts, public libraries, and private non-profit baccalaureate institutions. This network, known as the "K-20 Educational Telecommunications Network" seeks to create a statewide consortium to obtain economies of scale, reduce costs, and to expand educational opportunities at both public and private educational institutions.

It appears, however, that Washington's educational network is at risk, since by including private colleges, the K-20 network could lose eligibility for universal service discounts and forfeit millions of dollars each year for services directed at public K-12 schools and libraries. In essence, the FCC's current rules force Washington state to choose between sacrificing subsidies it cannot afford to lose, and denying services to private colleges that are a critical part of the state's educational and economic development equation.

I am aware that the Washington State Department of Information Services filed a petition in CC Docket 96-45 requesting that you reconsider and clarify your rules regarding consortia involving private colleges. I urge your careful consideration of this petition, and underscore my grave concern on this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Slade Gorton", with a stylized flourish at the end.

Slade Gorton
United States Senator

Congress of the United States
Washington, DC 20515

May 3, 1999

The Honorable William Kennard
Chairman
Federal Communications Commission
445 12th St. SW, Ste. 8B201
Washington, D.C. 20554

Dear Chairman Kennard:

We write to urge your prompt and favorable consideration of Washington state's petition (CC Docket 96-45) pending before you. We also attach a resolution recently passed by the Washington State Legislature urging the same. We are all united behind including independent colleges in the ground-breaking K-20 telecommunications network.

We are not asking that higher education institutions be eligible for the Universal Service discount. Current law precludes colleges (public and private) from participating in the E-rate program. We firmly believe, however, the singular exclusion of private colleges from the telecommunications network is above and beyond the requirements of the law. It is our belief that including independent colleges in the consortia, without penalty to the K-12 participants, will enhance the network. Washington's telecommunications network is on the cutting edge, and clearly the type of activity Congress had in mind when we passed the Telecommunications Act of 1996.

The federal government generally treats eligibility for all qualified higher education institutions the same. Distinctions are not made between public non-profit and private non-profit institutions. Application of this arbitrary distinction for the E-rate program is contrary to federal practice in all other areas.

FCC rules use the example of excluding a commercial bank from the consortia. It is completely understandable to exclude private for-profit entities from benefiting from the consortial arrangement. We urge you to make a distinction between private *for-profit* entities and private *non-profit* entities (such as the rural health providers currently allowed) and colleges.

We hope you will give prompt and careful consideration to the State of Washington's petition.

Sincerely,



The Honorable William Kennard
May 3, 1999
Page Two



Jennifer Dunn

Jack Metcalf

Norm Aiche

George P. Petersen, Jr.

Br. 3/8

CERTIFICATION OF ENROLLMENT

HOUSE JOINT MEMORIAL 4011

56th Legislature
1999 Regular Session

Passed by the House March 10, 1999

Yeas 94 Nays 0

Speaker of the House of Representatives

Speaker of the House of Representatives

Passed by the Senate April 6, 1999

Yeas 45 Nays 0

CERTIFICATE

We, Dean R. Foster and Timothy A. Martin, Co-Chief Clerks of the House Representatives of the State of Washington, do hereby certify that the is HOUSE JOINT MEMORIAL 4011 as passed by the House of Representatives Senate on the dates hereon set forth.

Chi

Chi

President of the Senate

Approved

FILED

Governor of the State of Washington

Secretary o
State of Wa

HOUSE JOINT MEMORIAL 4011

Passed Legislature - 1999 Regular Session

State of Washington

56th Legislature

1999 Reg

By Representatives Bush, Poulsen, Radcliff, Thomas, Scott, Huff, D. Schmidt, Lantz, Benson, Kessler, Wolfe, Schoesler, Santos, Grant, Quall, Boldt, Pennington, Mastin, Koster, Hankins, Esser, Regala, Cox, Schindler, McDonald, Clements, Wood, Cooper, Kenney, Reardon, Hurst, Talcott, Hatfield, Tokuda, Conway, Sump, Lovick, D. Sommers, Schual-Berke, Carlson, H. Sommers, McMorris, Fortunato, Murray, O'Brien, Anderson, Veloria and Haigh

Read first time 02/15/1999. Referred to Committee on Technology, Telecommunications & Energy.

TO THE HONORABLE WILLIAM J. CLINTON, PRESIDENT OF THE UNITED STATES, AND TO THE PRESIDENT OF THE SENATE AND THE SPEAKER OF THE HOUSE OF REPRESENTATIVES, AND TO THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES, IN CONGRESS ASSEMBLED, AND TO THE MEMBERS OF THE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION OF THE UNITED STATES SENATE, AND TO THE MEMBERS OF THE SUBCOMMITTEE ON TELECOMMUNICATIONS, TRADE AND CONSUMER PROTECTION, COMMITTEE ON COMMERCE, OF THE UNITED STATES HOUSE OF REPRESENTATIVES:

We, your Memorialists, the Senate and House of Representatives of the State of Washington, in legislative session assembled, respectfully represent and petition as follows:

WHEREAS, The Federal Communications Commission, pursuant to the Telecommunications Act of 1996, has implemented a universal service fund program to provide discounts on the cost of telecommunications services to schools and libraries; and

WHEREAS, On May 8, 1997, the Commission determined that schools and libraries that join consortia that include entities other than "public sector (governmental) entities" may not take advantage of the universal service fund program unless the services purchased by the consortia are based on tariffed rates; and

WHEREAS, This requirement effectively prevents schools and libraries from participating in consortia with nonprofit independent baccalaureate institutions without losing the advantages of the leveraged purchasing, economies of scale, and efficiencies that are the very rationale for such consortia; and

WHEREAS, Washington state has sought to leverage the state's purchasing power in its procurements of telecommunications and information services, and obtain the lowest prices for telecommunications services for universities, colleges, schools, and libraries; and

WHEREAS, The Washington Legislature in 1996 authorized and funded the development of the K-20 Educational Telecommunications Network, a sixty-two million dollar state-wide backbone network intended to link K-12 school districts, educational service districts, public and private baccalaureate institutions, public libraries, and community and

technical colleges; and

WHEREAS, This network will provide the consortium of Washington colleges, schools, and libraries with enhanced function and increased efficiencies in their use of telecommunications services; and

WHEREAS, Washington state is home to several outstanding nonprofit independent baccalaureate institutions, including Antioch University, Cornish College of the Arts, Gonzaga University, Heritage College, Northwest College, Pacific Lutheran University, St. Martin's College, Seattle University, Seattle Pacific University, University of Puget Sound, Walla Walla College, Whitman College, and Whitworth College, that are not "public sector (governmental) entities"; and

WHEREAS, These institutions each year prepare thousands of students for jobs in Washington state, and their graduates comprise more than twenty-five percent of the state's school teachers; and

WHEREAS, The Washington Legislature has recognized the important public service that these institutions perform; and

WHEREAS, The Washington Legislature has recognized that the public interest would be served by their inclusion in the K-20 Educational Telecommunications Network; and

WHEREAS, On July 16, 1997, the Washington Department of Information Services petitioned the Federal Communications Commission to clarify universal service program eligibility for schools and libraries that participate in telecommunications consortia with nonprofit independent colleges; and

WHEREAS, The Commission has not responded to that petition in more than eighteen months; and

WHEREAS, The state continues to delay the inclusion of nonprofit independent baccalaureate institutions in the K-20 Educational Telecommunications Network out of concern that doing so may render the network services provided to schools and libraries ineligible for universal service discounts; and

WHEREAS, Such continued delay is detrimental to the interests of the state;

NOW, THEREFORE, Your Memorialists respectfully pray that the members of the Committee on Commerce, Science, and Transportation of the United States Senate; and members of the Subcommittee on Telecommunications, Trade and Consumer Protection, Committee on Commerce, United States House of Representatives, urge the Federal Communications Commission to address promptly the matters raised in the Department of Information Service's Petition for Reconsideration, and find that schools and libraries may participate with independent colleges in consortia to procure telecommunications services at below-tariffed rates without losing their eligibility for universal service discounts.

BE IT RESOLVED, That copies of this Memorial be immediately transmitted to the Honorable William J. Clinton, President of the United States, the members of the Committee on Commerce, Science, and Transportation of the United States Senate, and members of the Subcommittee on Telecommunications, Trade and Consumer Protection, Committee on Commerce, United States House of Representatives, the President of the United States Senate, the Speaker of the House of Representatives, each member of Congress from the State of Washington, and the members of the Federal Communications Commission.



**Washington Association of
Independent Colleges and Universities**

February 22, 1999

Ms. Irene M. Flannery
Chief, Accounting Policy Division
Federal Communications Commission
Common Carrier Bureau
Washington, DC 20554

Dear Ms. Flannery:

Thank you for your time on February 2. I urge your favorable consideration of Washington's petition (CC Docket 96-45) allowing the inclusion of independent colleges in the state's K-20 telecommunications network.

As I mentioned at our meeting, current law precludes colleges (public or private) from participating in the discounted rates. Excluding private colleges from the telecommunications network is above and beyond the requirements of the law.

The federal government generally does not distinguish colleges by source of funds (student tuition vs state supported), but rather by quality through accreditation. This rule violates that principle.

The FCC concern for excluding private, for-profit entities such as commercial banks can be satisfied without also excluding private, non-profit colleges.

In many states, including Washington, independent colleges are a major producer of K-12 public school teachers. Eliminating these colleges from this network not only harms teacher preparation in the state, but also diminishes the possibilities of the network.

Sincerely,

Violet Boyer
President



**Washington Association of
Independent Colleges and Universities**

February 22, 1999

Mr. David Warren
President & Chief Executive Officer
National Association of Independent
Colleges and Universities
1025 Connecticut Avenue N. W., Suite 700
Washington, DC 20036

Dear David:

Thank you for your continuing strong leadership on behalf of our colleges and students.

Thank you also for Jon's help tackling our problem with the FCC. Washington state has a petition (CC Docket 96-45) pending before the FCC urging a reconsideration of its rule excluding private colleges from telecommunications networks that include K-12 schools receiving "e-rate" discounts. I seek your help on this issue. Absent help from the national level, it is possible that this ruling may be satisfied narrowly by only allowing Washington colleges to participate and not produce a change affecting all independent colleges.

This issue remains pending, and I believe sets a dangerous precedent to private colleges across the country. While excluding private colleges as private entities, the rules allow private K-12 schools and private rural health providers in such a network. FCC rules say that if private colleges participate in the network, K-12 schools would not be eligible for the discounted rate.

When Jon and I met with FCC officials, they seemed open to my arguments:

- In general, the federal government does not distinguish colleges by sources of funds (student tuition vs state supported), but rather quality through accreditation. These rules violate that principle.
- The FCC rules discuss their concerns that private entities such as a commercial bank not have access to lower rates available through the universal service rates. This concern can be satisfied without excluding independent colleges.

David Warren
February 22, 1999
Page Two

- In many states, including Washington, independent colleges are a major producer of K-12 public school teachers. Excluding them from the network with schools not only harms teacher preparation, but also diminishes the possibilities of the network.

Your help on this, perhaps through a letter to the FCC supporting appropriate treatment of private colleges, would be deeply appreciated.

Sincerely,


Violet Boyer
President

Thanks for your help.
